

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8824 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

GUJARAT STATE FERTILISERS AND CHEMICALS LTD

Versus

SURENDRA T AMIN

Appearance:

1. Special Civil Application No. 8824 of 1999
MR KARTIK THACKER For M/S TRIVEDI & GUPTA
for Petitioner No. 1
MR NK MAJMUDAR for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 09/08/2004

ORAL JUDGEMENT

1.0. The petitioner Gujarat State Fertilizers &
Chemicals Ltd., by way of this petition has challenged

the order dated 6th February, 1999 in Gratuity Case no. 44/98 passed by the Controlling Authority appointed under the provisions of Payment of Gratuity Act, 1972, which was confirmed by the appellate authority vide order dated 10th September, 1999.

2.0. The short facts of the case as they emerge from the record of the petition are that the respondent at the relevant point of time was working as Manager [Agro Project] and was drawing salary of Rs.11,600=00 p.m. It is the case of petitioner that for holding the aforesaid post and position, high degree of responsibility, trust and confidence are required from the incumbent holding the office and in the present case the respondent was authorized on behalf of the petitioner to deal with its customers to enter into financial transactions as well powers to withdraw the money from and/or make payments on behalf of the petitioner.

2.1. It is the case of the petitioner that in view of the serious irregularities with regard to misusing authority and power as well as committing act of misappropriation etc., the respondent was served with order dated 17th July 1996 placing him under suspension with immediate effect. It is further the case of the petitioner that subsequently in view of the aforesaid acts, which also amounts of moral turpitude, the respondent was served with the chargesheet dated 8th August, 1996. Apart from that a criminal complaint being Criminal Complaint No. 67/96 has been filed against the respondents in the Court of Judicial Magistrate, First Class, Vadodara.

2.2. It is further the case of the petitioner that due to the aforesaid irregularities and misconduct, the petitioner lost confidence and trust in the respondent. Therefore, the petitioner withdrew the aforesaid suspension order and chargesheet and under Rule 44 of the Company's Service Rules discharged the respondent from the service vide order dated 9th April, 1997 by making payment of three months' salary in lieu of notice.

2.3. The petitioner further submitted that since the irregularities committed by the respondent was not only a serious and grave nature but also amounts to moral turpitude, more particularly at the relevant time the respondent was holding position of high responsibility, power and confidence, the petitioner was entitled to forfeit the amount towards gratuity.

2.4. The grievance of the petitioner is that though

the respondent was not workman/employee, he preferred an application being Gratuity Case No. 44/98 before the Controlling Authority, under the provisions of Payment of Gratuity Act. Before the Controlling Authority, both the parties adduced material and after appreciating the material produced before it, the Controlling authority vide order dated 6th February, 1999 allowed the application and directed the petitioner to pay an amount of Rs.2,32,000=00 alongwith the interest at the rate of 10% from 8th May, 1997 to the respondent.

2.5. Being aggrieved by the order of the Controlling Authority, the petitioner preferred an appeal being Gratuity Appeal No. 13/99 before the Appellate Authority. The Appellate Authority vide order dated 10th September, 1999 dismissed the appeal and confirmed the order dated 6th February, 1999 passed by the Controlling Authority. Hence, this petition.

3.0. Mr. Thacker learned advocate for the petitioner has submitted that in view of serious irregularities committed by the respondent, criminal complaint no.67/96 has been filed against the respondent. He further submitted that in view of the serious irregularities involving moral turpitude, under Clause (6) of Section 4 of the Payment of Gratuity Act, it is the right of the employer to forfeit the amount of gratuity and, therefore, both the authorities have committed error in allowing the application and rejecting the appeal filed by the petitioner.

3.1.1. Mr. Thacker submitted that the word used is "terminated" and if it is read with clause (1) of Section 4 of Payment of Gratuity Act, word "termination" is used in a generic way, which includes discharge.

3.2. In view of that, Mr. Thacker has placed reliance on the dictionary meaning of the New Shorter Oxford Dictionary, which reads as under :-

The New Shorter Oxford Dictionary :-

Termination : The action of terminating. (1)
Determination, decision, (2) The action of putting an end to something or bringing something to a close. Formerly also, the action of limiting something spatially, bounding. The cessation of the building up of a polymer molecule. Dismissal from

employment. The ending of pregnancy before term by artificial means; an induced abortion. Assassination. The point or part in which anything ends. End, cessation, close, conclusion. Also, outcome, result. The final syllable, letter, or group of letters in a word; a final element affixed to a word or stem to express some relation or modification of sense; an ending, a suffix. A limit, bound; an end, an extremity.

Terminate : Determine; state definitely. Also, express in words. Direct to something as object or end. Bring to an end, put an end to, cause to cease; finish, end. Come at the end of, form the conclusion of. End before term by artificial means. Dismiss from employment. Assassinate. Limit, restrict, confine to or in. Bound or limit spatially; form the physical end or extremity of.

Discharge : The act of freeing from obligation, liability, or restraint; exoneration from accusation or blame; release from a responsibility or position, or from service; release from custody; dismissal from office or employment. Something that frees from obligation; a certificate of this; a receipt. The act of freeing from or removing a load; unloading; removal. The act of firing a weapon or missile, letting fly an arrow, etc. Fulfillment. execution. The act of settling a monetary liability; payment. The act of sending or pouring out; ejection; emission. That which is emitted, from a wound etc. The release of a quantity of electricity from a

charged object; a flow of electricity through the air or other gas, esp. when accompanied by luminosity. The place where a river enters the sea or a lake. Formerly, the act of sending away. Now only in Law, dismissal or reversal of a court order. The relieving of some part of weight or pressure; a structure for effecting this. The process of removing the colour from a fabric; a mixture used for this. With the person or thing relieved as; Relieve of; exonerate; release from; relieve of residual obligation by fulfilling it. Unload; relieve of a load; disburden. Ride, deprive. Now rare. Disburden by speech. Eject a projectile from, fire. Release an electric charge. Command not to do something; prohibit, forbid. Relieve of a responsibility or position; release from service; dismiss from office or employment. Clear of a charge or accusation; acquit. Dismiss; release from custody. Send away; let go. Relieve of pressure by distributing it over adjacent parts.

Dismissal : The action or an act of dismissing esp. from employment, one's presence, or one's thoughts.

3.1.2. In the decision of the Apex Court in the case of Sheikh Gulfan v. Sanat Kumar reported in A.I.R. 1965 S.C. p.1839, wherein in the Apex Court has held as under :-

"19. The words used in S. 30(c) of the Act are, in a sense, simple enough, but it must be conceded that the problem of their construction is not very easy, and so, we might attempt to resolve this problem by considering what our approach

should be in constructing the relevant provision. Normally, the words used in a statute have to be construed in their ordinary meaning, but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words does not meet the ends of a fair and a reasonable construction. Exclusive reliance on the bare dictionary meaning of words may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the provision is included and the policy underlying the statute assume relevance and become material. As Balsbury has observed, the words "should be construed in the light of their context rather than what may be either their strict etymological sense or their popular meaning apart from that context". This position is not disputed before us by either party."

3.1.3. Mr. Thacker has further placed reliance on the decision of the Calcutta High Court in the case of Brojo Gopal Sarkar v. Commissioner of Police & Anr., reported in A.I.R. 1955 Calcutta, p.556, wherein it has been held as under :-

"11. A removal or dismissal from the office of a Special Constable may have the effect of casting a slur on the character of the officer concerned or may affect him materially in respect of any other office which he may be holding under the Government or any other employer. It is, therefore, only reasonable and proper that he should have an opportunity of showing cause against the action proposed to be taken against him.

Now what sort of opportunity is to be given to a civil servant is clear

from the decision of the Privy Council in High Commissioner for India v. I.M. Lall A.I.R. 1948 PC 121 (E) which has been approved of and followed by the Supreme Court of India in the case of P. Joseph John v. State of Travancore - Cochin, (S) A.I.R. 1955 S.C. 160 (F). It is not disputed by the learned advocate for the respondents that no such opportunity was given to the petitioner in the present case.

12. It has been held that the word "discharge" has the same connotation as "removal" and should be construed so as to be included within the term "dismissal" - Ramesh Chandra v. State of West Bengal, A.I.R. 1953 Cal. 188 (G). It is conceded that the petitioner has been discharged by an Authority subordinate to that by which he was appointed. This was clearly contrary to the provisions of Article 311 (1) of the Constitution.

In my view this petition must succeed.

The Rule is accordingly made absolute and the orders dated 30-7-1952 and 18-8-1952 are quashed. In the circumstances of this case, I direct that each party will bear its own costs of this application."

3.1.4. Mr. Thacker has also placed reliance on the decision of the Apex Court in the case of Moti Ram v. North East Frontier Railway reported in A.I.R. 1964 S.C. p.621, wherein the Apex Court has held as under :-

"65. What is the scope of the relevant words, "dismissed" and "removed" in Article 311 of the Constitution. The general rule of interpretation which is common to statutory provisions as well as to constitutional provisions is to find out the expressed intention of the makers of the said provisions from the words of the provisions themselves. It is also equally well settled that, without doing violence to the language used, a constitutional provision shall receive a

fair, liberal and progressive construction, so that its true objects might be promoted. Article 311 uses two well-known expressions "dismissed" and "removed". The Article does not, expressly or by necessary implication, indicate that the dismissal or removal of a Government servant must be of a particular category. As the said Article gives protection and safeguard to a Government servant, who will otherwise be at the mercy of the Government, the said words shall ordinarily be given a liberal or at any rate their natural meaning, unless the said Article or other Articles of the Constitution, expressly or by necessary implication, restrict their meaning. I do not see any indication anywhere in the Constitution which compels the Court to reduce the scope of the protection. The dictionary meaning of the word "dismiss" is "to let go; to relive from duty". The word "remove" means "to discharge, to get rid off, to dismiss". In their ordinary parlance, therefore, the said words means nothing more or less than the termination of a person's office. The effect of dismissal or removal of one from his office is to discharge him from that office. In that sense, the said words, comprehend every termination of the services of a Government servant. Article 311 (2) in effect lays down that before the services of a Government servant are so terminated, he must be given a reasonable opportunity of showing cause against such a termination. There is no justification for placing any limitation on the said expressions, such as that the dismissal or removal should have been the result of an enquiry in regard to the Government servant's misconduct. The attempt to imply the said limitation is neither warranted by the expressions used in the Article or by the reason given, namely, that otherwise there would be no point in giving him an opportunity to defend himself. If this argument be correct, it would lead to an extra-ordinary result, namely, that a Government servant who has

been guilty of misconduct would be entitled to a "reasonable opportunity" whereas an honest Government servant could be dismissed without any such protection. In one sense the conduct of a party may be relevant to punishment; ordinarily punishment is meted out for misconduct, and if there is no misconduct there could not be punishment. Punishment is, therefore, correlated to misconduct, both in its positive and negative aspects. That is to say, punishment could be sustained if there was misconduct and could not be meted out if there was no misconduct. Reasonable opportunity given to a Government servant enables him to establish that he does not deserve the punishment, because he has not been guilty of misconduct. That apart, a Government servant may be removed or dismissed for any other reasons, such as retrenchment, abolition of post, compulsory retirement and others. If an opportunity is given to a Government servant to show cause against the proposed action, he may plead and establish that either there was no genuine retrenchment or abolition of posts or that others should go before him."

Thus, the word terminated is used in the present case. The order in the present case is simple discharge. It is punitive action, without any stigma.

3.1.5. The main contention of Mr. Thacker is that "discharge" includes "termination" is giving too wide a meaning of the word "discharge". As stated hereinabove, in view of the judgement of the apex court, the word is to be read with reference to the context of the object of the Act.

3.1.6. In the decision of the Apex Court in the case Parshotam Lal Dhingra v. Union of India, reported in A.I.R. 1958 S.C. p.36, wherein it is held as under :-

"26. The foregoing conclusion, however, does not solve the entire problem, for it has yet to be ascertained as to when an order for the termination of service is inflicted as and by way of punishment and

when it is not. It has already been said that where a person is appointed substantively to a permanent post in Government service, he normally acquires a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with Art. 311(2). Termination of service of such a servant so appointed must per se be a punishment, for it operates as a forfeiture of the servant's rights and brings about a premature end of his employment. Again where a person is appointed to a temporary post for a fixed term of say five years his service cannot, in the absence of a contract or a service rule permitting its premature termination be terminated before the expiry of that period unless he has been guilty of some misconduct, negligence, in. efficiency or other disqualifications and appropriate proceedings are taken under the rules read with Art. 311(2). The premature termination of the service of a servant so appointed will prima facie be a dismissal or removal from service by way of punishment and so within the purview of Art. 311(2). Further, take the case of a person who having been appointed temporarily to a post has been in continuous service for more than three years or has been certified by the appointing authority as fit for employment in a quasipermanent capacity, such person, under r. 3 of the 1949 Temporary Service Rules, is to be deemed to be in quasi-permanent service which, under r. 6 of those Rules, can be terminated (i) in the circumstances and in the manner in which the employment of a Government servant in a permanent service can be terminated or (ii) when

the appointing authority certifies that a reduction has occurred in the number of posts available for Government servants not in permanent service. Thus when the service of a Government servant holding a post temporarily ripens into a quasi-permanent service as defined in the 1949 Temporary Service Rules, he acquires a right to the post although his appointment was initially temporary and, therefore, the termination of his employment otherwise than in accordance with r. 6 of those Rules will deprive him of his right to that post which he acquired under the rules and will prima facie be a punishment and regarded as a dismissal or removal from service so as to attract the application of Art. 311. Except in the three cases just mentioned a Government servant has no right to his post and the termination of service of a Government servant does not, except in those cases, amount to a dismissal or removal by way of punishment. Thus where a person is appointed to a permanent post in a Government service on probation, the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment, for the Government servant, so appointed, has no right to continue to hold such a post any more than the servant employed on probation by a private employer is entitled to do. Such a termination does not operate as a forfeiture of any right of the servant to hold the post, for he has no such right and obviously cannot be a dismissal, removal or reduction in rank by way of punishment. This aspect of the matter is recognised in the Explanation to r. 49 of the 1930 Classification Rules which correspond to the Note to r. 1702 of the Indian Railway Code and r. 3 of the 1955 Rules and r. 13 of the 1957 Rules, for all those rules expressly say that the termination of such an appointment does not amount to the punishment of dismissal or removal within the meaning of those rules. Likewise if the servant is appointed to officiate in a permanent

post or to hold a temporary post other than one for a fixed term, whether substantively or on probation or on an officiating basis, under the general law, the implied term of his employment is that his service may be terminated on reasonable notice and the termination of the service of such a servant will not per se amount to dismissal or removal from service. This principle also has been recognised by the Explanations to r. 49 of the 1930 Classification Rules corresponding to the Note to r. 1702 of the Indian Railway Code and r. 5 of the 1949 Rules and r. 3 of the 1955 Rules and r. 13 of the 1957 Rules. Shortly-put, the principle is that when a servant has right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post as where he is appointed to a post, permanent or temporary either on probation or on an officiating basis and whose temporary service has not ripened into a quasipermanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment. One test for determining whether the termination of the service of a Government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post as in the three cases hereinbefore mentioned, the termination of his service will by itself be a punishment and he will be entitled to the protection of Art. 311. In other words and broadly speaking, Art. 311 (2), will apply to those cases where the Government

servant, had he been employed by a private employer, will be entitled to maintain an action for wrongful dismissal, removal or reduction in rank. To put it in another way, if the Government has, by contract, express or implied, or, under the rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is, prima facie and per se, not a punishment and does not attract the provisions of Art. 311.

3.1.7. In the decision of the Apex Court in the case of The Workmen of Sudder Office, Cinnamara v. The Management of Sudder Office & Anr., reported in 1971 (II) L.L.J. p.620, wherein the Apex Court has observed as under :-

"19. Before we consider the contentions of the learned counsel on both sides, it is necessary to refer to Cl.9 of the standing orders of the company. Clause 9 of the standing orders is as follows :-

"9.Termination of an employment and notice thereof, to be given by the employer and workmen.

Notice of termination of employment, whether by manager or by worker shall be given equal to the wage-period of the worker concerned.

Provided that -

(a) the manager may terminate the employment of a worker forthwith and pay his wages for the wage period (equivalent to his average earnings over the preceding period of three months) in lieu of notice.

(b) Notice of termination of employment shall be necessary only in case of permanent workers and not in the case of outside or temporary workers except in so far as is laid down in any

agreement entered into between the manager and such outside or temporary workers.

(c) The manager may dismiss without notice any worker who is guilty of gross misconduct but such worker must be informed in writing of the alleged misconduct and be given an opportunity to explain the circumstances alleged against him.

(d) Where employment of any worker is terminated the wages earned by him and other dues, if any, shall be paid before the expiry of the second working day on which his employment is terminated.

(e) The manager may, when a worker is charged with misconduct, direct that such worker be suspended pending investigation by the management into the charge of misconduct and during the period of suspension the worker shall be entitled to receive an allowance of not less than one-half of his wages provided that if the charge of misconduct is not proved the worker shall be entitled to receive full wage for the period of suspension."

20. Clause 10 enumerates the acts or omissions which constitute misconduct. As the Labour Court has held that the misconduct alleged against the workman will come under cl. 10(a)(2), we will refer only to that particular sub-clause :-

"(10) Acts or omissions which constitute misconduct.

(a) The following acts and omissions shall constitute gross misconduct :-

(2) Theft, fraud or dishonesty in connection with the company's business or property."

21. From a perusal of cl.9, it is seen that there is a power in the management to terminate under sub-cl. (a) the employment of a workman forthwith by paying the amount of wages mentioned therein in lieu of notice. Notice of termination is mandatory only in cases of persons enumerated in sub-cl. (b). Sub-clause (d) provides that the employer is bound to pay the wages earned by the workman and any other dues within the period mentioned therein. Sub-clause (a), (b) and (d) will have to be read together. Sub-clause (c), on the other hand, deals with the power of the management to dismiss without any notice any workman who is guilty of gross misconduct. The said sub-clause also lays down the procedure to be adopted before an order of dismissal is passed. Sub-clause (e) given power to the management when a workman is charged with misconduct to place him under suspension pending inquiry. It also provides for payment of allowances during the period of suspension and for payment of full wages, if misconduct is not proved. Sub-clause (c) and (e) deal with disciplinary action taken against an employee resulting in punishment awarded by way of dismissal. The acts or omissions which constitute misconduct are also enumerated in cl.10 of the standing orders. According to the Labour Court, in this case, it must be considered that the workman has been found guilty of dishonesty in connection with the company's property, the three pulleys, and it will constitute misconduct under cl.10 (a) (2) of the standing orders. It is on that basis that the Labour Court has come to the conclusion that the order of termination is really one of dismissal for misconduct."

Thus, in the present case, termination is not dismissal, but it is discharge.

3.2.0. Assuming that even if it is termination the employer has to give notice & withhold the same immediately on termination and it cannot take it as defence before the authority.

3.2.1 The contention regarding forfeiture is raised for the first time before the authority which is not permissible in view of the fact that exception is carved out in section 4 to protect the damage caused to the employer. No such procedure is followed. Therefore, the contention of Mr.Thacker is not well founded.

3.2.2. The decision of this Court in the case of Ahmedabad Municipal Corporation v. Ellvina Samualbhai Christian reported in 2002 (I) L.L.J. p.342, wherein it has been held as under:-

"9. Section 4(6) of the payment of Gratuity Act provides as under :-

"Notwithstanding anything contained in sub-section (1), -

(a) the gratuity of an employee,
whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to or destruction of property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited -

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or,

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude

provided that such offence is committed by him in the course of his employment."

10. It is thus, clear from the above provision that unless a specific order for forfeiture of gratuity either in part or in whole is passed by the employer, the employee becomes entitled to receive gratuity."

However, in the present case, no specific order for forfeiture of amount of gratuity is passed by the petitioner.

3.2.3. Similar view has been taken in the case of the decision of the Delhi High Court in the case of Texmaco Ltd. v. Roshan Singh reported in 2001 (II) L.L.J. p.982 [2002 L.L.R p.7.], wherein the Court has held that the orders of authorities are required to be quashed and set aside on the ground that amount of gratuity cannot be withheld without notice as no procedure has been followed by the petitioner.

3.3.0. Mr. Thacker contended that a criminal case is pending and till those proceedings are not completed, the petitioner is entitled to withhold the amount of gratuity. The same cannot be accepted in view of the decision of Bombay High Court in the case of Rajendra Kumar Nangia v. Rashtriya Chemicals & Fertilizers Ltd., reported in 2002 (I) L.L.J. p.648 [2000 L.L.R. p.267], wherein, the Court has held as under :-

"4. It would be seen that sub-section (1) of Section 4 of the Payment of Gratuity Act, 1972, provides that gratuity shall be payable to an employee on termination of his employment after he has rendered continuous service for not less than five years. The termination of the employment may be on superannuation or on retirement or resignation or death or disablement due to accident or disease of the employee. Thus, an employee becomes entitled to payment of gratuity under the statute. Sub-section (6) is an exception to sub-section (1) and makes a provision of forfeiture of the gratuity wholly or partially in the circumstances mentioned therein. According to sub-section (6), gratuity of an employee may be forfeited

to the extent of damage or loss caused to the employer if service of that employee has been terminated for any act, wilful omission or negligence on that ground. The gratuity payable to an employee may also be forfeited wholly or partially if the service such employee has been terminated for his riotous or disorderly conduct or any other act of violence on his part or service of such employee has been terminated for any act constituting an offence involving moral turpitude. Though a criminal case was registered against the petitioner by CBI in the year 1993, the fact is petitioner's services have been terminated simpliciter on his superannuation and not for any of the grounds mentioned under sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972. As a matter of fact, admittedly, till petitioner's superannuation and even till date no departmental proceedings of misconduct have been initiated against the petitioner. In this backdrop of facts, it was not open to the respondents to refuse to release the gratuity amount to the petitioner."

Admittedly, in the present case, no inquiry is pending & no order is passed for forfeiture of amount of gratuity.

3.4.1. It may be noted here, that the Payment of Gratuity Act is a Labour beneficial legislation and therefore, whenever there is any interpretation of any of the provisions of the said Act, one has to keep in mind the said principle.

3.4.2. In the decision of the Apex Court in the case of Kanai Lal v. Paramnidhi reported in A.I.R. 1957 S.C. p.907, wherein the Court has held as under :-

"6. Mr. N.C. Chatterjee, for the appellant, has contended that the object in enacting the relevant Thika Tenancy Acts and Ordinances is absolutely clear. It is a piece of welfare legislation and as such its operative provisions should receive a beneficent construction from the Courts. If the scheme of the Act and the object underlying it is to afford full

protection to the thika tenants, says Mr. Chatterjee, Courts should be slow to reach the conclusion that any class of thika tenants are excluded from the benefit of the said Act.

In support of his argument Mr. Chatterjee, has naturally relied on the observations made by Barons of the Exchequer in Heydon's case (1584) 3 Co. Rep 7a (A). Indeed these observations have been so frequently cited with approval by Courts administering provisions of welfare enactments that they have now attained the status of a classic on the subject and their validity cannot be challenged.

However, in applying these observations to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.

The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the Courts would prefer to adopt the latter construction.

It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct. Indeed, Mr. Chatterjee, himself fairly conceded that he would not

be justified in asking the Court to put an undue strain on the words used in the section in order that a construction favourable to the thika tenants should be deduced. It is in the light of this legal position that we must now consider S. 5, sub-s (1) of West Bengal Act, II of 1949, amended by West Bengal Act VI of 1953."

3.4.3. In the decision of the Apex Court rendered the case of M/s. V/O Tractoroexport v. M/s. Tarapore & Co. reported in A.I.R. 1971 S.C. p.1, wherein the Apex Court has held as under :-

"16. Now, as stated in Halsbury's Laws of England Vol. 36, p.414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law.

17. We may look at another well-recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations.

But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had in municipal law."

3.4.4. In the decision of the High Court of Patna in the case of Ram Ranjan Mukherjee & Ors., v. Mining & Allied Machinery Corporation Ltd., reported in 2001 (I) L.L.J. p. 1020, wherein the Court has held as under :-

"3. Similar questions arose for consideration of the Court in W.P. No. 22504 (W) of 1998 Tapan Kumar Bhattacharjee & Ors. v, MAMC & Ors I, by my judgment and order dated July 25, 2000 in W.P. No. 22504 (W) of 1998, inter alia held -

(a) Gratuity is now treated as valuable right and property of the employees.

(b) Any culpable delay in settlement and disbursement of gratuity must be visited with the penalty of payment of interest at the current rate till actual payment.

(c) Except under Section 4 sub-section (6) of the Payment of Gratuity Act, 1972, no deduction can be made from the amount of gratuity payable to an employee under the provisions of Payment of Gratuity Act, 1972.

(d) If a "State" within the meaning of Article 12 of the Constitution deducts any amount from the

admitted amount of gratuity payable under the Payment of Gratuity Act, 1972, not in accordance with law then such deduction amounts to deprivation of property within the meaning of Article 300-A of the Constitution of India and such deprivation is arbitrary and violates the provisions of Article 14 of the Constitution of India.

(e) Gratuity due to an employee under the provisions of Payment of Gratuity Act, 1972 cannot be withheld merely because the claim for damages for unauthorised occupation is pending since right to gratuity is not dependent upon the employee vacating the official accommodation.

(f) There can be no estoppel against the Payment of Gratuity Act, 1972,

(g) An employee cannot waive his rights under the Payment of Gratuity Act, 1972 because the provisions of Payment of Gratuity Act have been enacted for reasons of public policy.

5. Payment of Gratuity to the employees under the Payment of Gratuity Act, 1972, is a mandatory statutory obligation which cannot be trifled with by adaptation of a method which runs counter to the statute. The statutory obligation of payment of gratuity cannot be left high and dry on the whims of the employer irrespective of the factum of the employer being an authority within the meaning of Article 12 or not. There is a mandate of the Payment of Gratuity Act that gratuity is to be paid to the employee on his retirement or to his dependents in the event of early death. I am of the view that by introducing VRS the mandate of the Payment of Gratuity Act cannot be violated. Paragraph 6 (2) of VRS lays

down that the payment under VRS shall be made after handing over all charges of the posts including tools, materials, accessories and residential accommodation allotted by the Corporation. In my opinion, the aforesaid paragraph 6 (2) of VRS cannot be made applicable in respect of payment of gratuity under Payment of Gratuity Act, 1972 because if the said paragraph is made applicable in respect of payment of gratuity then it shall violate the mandate of the provisions of Payment of Gratuity Act and cannot be termed to be illegal in the nature.

6. Some of the petitioners might have preferred application under Section 7 (4) (a) of the Payment of Gratuity Act, 1972 but such making of application is not at all relevant for the purpose of determination of this case because there is no dispute about the admitted amount of gratuity. The dispute relates to whether deductions can be made from the admitted amount of gratuity though such deductions are not permitted by the provisions of the Payment of Gratuity Act, 1972. Therefore, i find that there is no suppression of material fact which can disentitle the writ petitioners from obtaining any relief from the Court.

7. It was also argued by the learned advocate for the respondents that some of the petitioners have been given undertaking to the effect that deduction can be made from their gratuity. I am of the view that such undertaking does not amount to waiver of the employee's right because such right has been created by the statute from reasons of public policy.

8. In view of the discussions made hereinabove, I am of the opinion that petitioners are entitled to undisputed amount of gratuity under the Payment of Gratuity Act, 1972 and no amount can be deducted from the said admitted amount of gratuity except in accordance with sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972."

Thus, it is clear that it is the right of employee which cannot be withheld without proper reasons and without proper procedure.

3.5.0. In the decision of the High Court of Allahabad in the case of Swadeshi Cotton Mills v. Asst. Labour Commissioner (Central) & Controlling Authority under Payment of Gratuity Act, Allahabad & Ors reported in 2000 (I) L.L.J. p.1221, wherein it has been held as under :-

"16. As observed above, the SICA, 1985, is a legislation made in public interest for securing timely detection of sick companies owning industrial undertakings and it was thus a legislation for the benefit of the industries in public interest. The public interest cannot be looking bereft of the interests of the workmen. The policy behind the labour legislations is aimed at securing justice to the workmen and to avoid exploitation by employers, either by non-payment of wages or by wrongful retrenchment or by withholding payment of wages or the like. Thus, a protection of the interest of an industrial company may not be given an upper hand to the protection of the labourers working therein and, as observed by the Bombay High Court in the case of NTC v. B.J. Jalgoonkar (supra), Section 22 of the SICA 1985, must not be allowed to defeat the legitimate claim of the workmen for wages. In fact, this decision was based on the finding of the Apex Court in the case of Dy. Commercial Tax Officer (Supra) wherein it had been held that recovery of commercial tax could not be barred under Section 22 of the SICA, 1985. Gratuity, as observed above, is related not only to the period of employment but also to wages and the payment of gratuity is one of the beneficial measures introduced by labour legislation. To extend the provisions of Section 22 of the SICA, 1985 to prohibit recovery of gratuity, which is related to wages, would be a negation of a legally accepted right of the workmen. Section 22 must be interpreted not to cover bar on recovery of payment of wages or

gratuity to workmen. Seen in this light, the objection of the petitioners against the impugned recoveries is not tenable."

Thus, under the guise of alleged loss, amount of gratuity cannot be withheld.

3.6.1 In the decision of the Apex Court in the case of D.V. Kapoor v. Union of India reported in A.I.R. 1990 S.C. p.1923, wherein the Apex Court has held as under :-

"7. Rule 9 of the rules empowers the President only to withhold or withdraw pension permanently or for a specific period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution. The impugned order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. No provision of law has been brought to our notice under which the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction."

However, from the aforesaid decision, it is clear that even the Government cannot withhold the amount of gratuity. Therefore, the employer cannot withhold the amount of gratuity without due process of law.

3.6.2. In the decision of the Apex Court in the case of Delhi Cloth & General Mills Co., Ltd. v. Workmen & Ors. reported in A.I.R. 1970 S.C. p.919, wherein it is held

as under :-

"26. As already stated, gratuity is not in its present day concept merely a gift made by the employer in his own discretion. The workmen have in course of time acquired a right to gratuity on determination of employment provided the employer can afford having regard to his financial condition, to pay it. There is undoubtedly no statutory direction for payment of gratuity as it is in respect of provident fund and retrenchment compensation. The conditions for the grant of gratuity are, as observed in Bharatkhand Textile Mfg. Co. Ltd.'s case(1), (i) financial capacity of the employer; (ii) his profit making capacity; (iii) the profits earned by him in the past; (iv) the extent of his reserves; (v) the chances of his replenishing them; and (vi) the claim for capital invested by him. But these are not exhaustive and there may be other material considerations which may have to be borne in mind in determining the terms and conditions of the gratuity scheme. Existence of other retiring benefits such as provident fund and retrenchment compensation or other benefits do not destroy the claim to gratuity: its quantum may however have to be adjusted in the light of the other benefits.

35. A similar view was expressed in Remington Rand of India Ltd.'s case (2). In Calcutta Insurance Company Ltd. 's case, 1968 02 Lab L.J. 542, (SC), In Calcutta Insurance Co. Ltd., case, 1967-2 Lab LJ 1 = (A.I.R. 1967 SC 1286) however protest was raised against acceptance of this rule without qualification. Mitter, J., observed at p. 9 that it was difficult to concur in principle with the opinion expressed in the Garment Cleaning Works case, 1961-1 Lab LJ 513 = (A.I.R. SC 673), Mitter, J., observed:

"We are inclined to think that it (gratuity) is paid to a workman to ensure good conduct throughout the period he

serves the employer. 'Long and meritorious service must mean long and unbroken period of service meritorious to the end. As the period of service must be unbroken, so must the continuity of meritorious service be a condition for entitling the workman to gratuity. If a workman commits such misconduct as causes financial loss to his employer, the employer would, under the general law, have a right of action against the employee for the loss caused, and making a provision for withholding payment of gratuity where such loss was caused to the employer does not seem to aid to the harmonious employment of labourers or workmen. Further, the misconduct may be such as to undermine the discipline in the workers---a case in which it would be extremely difficult to assess the financial loss to the employer."

"Misconduct" spreads over a wide and hazy spectrum of industrial activity: the most seriously subversive conduct rendering an employee wholly unfit for employment to mere technical default are covered thereby. The parliament enacted the Industrial Employment (Standing Orders) Act, 1946, which by s. 15 has authorised the appropriate Government to make rules to carry out the purposes of the Act and in respect of additional matters to be included in the Schedule. The Central Government has framed certain model standing rules by notification dated December 18, 1946, called 'The Industrial Employment (Standing Orders) Central Rules, 1946'. In Sch. I-Model Standing Orders--cl. 14 provides:

"(1) xxx xxx xxx xxx

(2) A workman may be suspended for a period not exceeding four days at a time, or dismissed without notice or any compensation in lieu of notice, if he is found to be guilty of misconduct.

(3) The following acts and omissions shall be treated as misconduct :--

- (a) wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior,
- (b) theft, fraud or dishonesty in connection with the employer's business or property,
- (c) wilful damage to or loss of employer's goods or property,
- (d) taking or giving bribes. or any illegal gratification,
- (e) habitual absence without leave or absence without leave for more than 10 days,
- (f) habitual late attendance,
- (g) habitual breach of any law applicable to the establishment,
- (h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline, (i) habitual negligence or neglect of work,
- (j) frequent repetition of any act or omission for which a fine may be imposed to a maximum of 2 per cent of the wages in a month,
- (k) striking work or inciting. others to strike work in contravention of the provisions of any law, or rule having the force of law." '

A bare perusal of the Schedule shows that the expression "misconduct" covers a large area of human conduct. On the one hand are the habitual late attendance, habitual negligence and neglect of work: on the other hand are riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline, wilful insubordination or disobedience. Misconduct falling under several of these

latter heads of misconduct may involve no direct loss or damage to the employer, but would render the functioning of the establishment impossible or extremely hazardous. For instance, assault on the Manager of an establishment may not directly involve the employer in any loss or damage which could be equated in terms of money, but it would render the working of the establishment impossible. One may also envisage several acts of misconduct not directly involving the establishment in any loss, but which are destructive of discipline and cannot be tolerated. In none of the cases cited any detailed examination of what type of misconduct would or would not involve to the employer loss capable of being compensated in terms of money was made: it was broadly stated in the cases which have come before this Court that notwithstanding dismissal for misconduct a workman will be entitled to gratuity after deducting the loss occasioned to the employer. If the cases cited do not enunciate any broad principle we think that in the application of those cases as precedents a distinction should be made between technical misconduct which leaves no trail of indiscipline, misconduct resulting in damage to the employer's property, which may be compensated by forfeiture of gratuity or part thereof, and serious misconduct which though not directly causing damage such as acts of violence against the management or other employees or riotous or disorderly behaviour, in or near the place of employment is conducive to grave indiscipline. The first should involve no forfeiture: the second may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third may entail forfeiture of gratuity due to the workmen. The precedents of this Court e.g. (1963) 2 Lab LJ 403 = (A.I.R. 1964 SC 864), Remington Rand of India Ltd. case, (1968) 2 Lab LJ 542 (SC) and Motipur Zamindari (P) Ltd's case 1965-2 Lab LJ 139 (SC) do not compel us

to hold that no misconduct however grave may be visited with forfeiture of gratuity. In our judgment, the rule set out by this Court in Wenger & Co.'s case (1963) 2 Lab LJ 403 = (A.I.R. 1964 SC 864) and Motipur Zamindari (P) Ltd.'s case 1965-2 Lab LJ 139 (SC) applies only to those cases where there has been by actions wilful or negligent any loss occasioned to the property of the employer and the misconduct does not involve acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment. In these exceptional cases--the third class of cases the employer may exercise the right to forfeit gratuity: to hold otherwise would be to put a premium upon conduct destructive of maintenance of discipline."

3.6.3. In the decision of Apex Court in the case of Management of Tournamulla Estate v. Workmen reported in A.I.R. 1973 S.C. p. 2344, wherein it is held as under :-

"2. The point before us is simple. The workman concerned was charge-sheeted in respect of riotous and disorderly behaviour for having assaulted a tea maker Shri U. M. Abdul Kadar on May 29, 1965, inside the factory. A departmental enquiry was held wherein, it is said, he was given every opportunity to fully participate. He was found guilty of misconduct by the domestic tribunal and was accordingly dismissed. There was a scheme of gratuity in force, which was and is not challenged by the respondent. Clause 4 of that scheme, which is called "Terms of Agreement", provides that if a dispute arises regarding a claim for payment of gratuity of a workman who has been dismissed for misconduct, such a dispute shall be referred to the labour court having jurisdiction, for decision. As a dispute arose with regard to the payment of gratuity, the matter was referred to the Labour court. Before

that court, in the statement of case submitted by the Secretary of the Malabar Estate Workers' Union, it was stated in clause (c) as follows :

"The worker was not paid gratuity on dismissal, in spite of making a request for the same. There is a gratuity scheme applicable to this estate and as per the terms of the scheme if a dispute arises regarding the payment of gratuity to a dismissed workman, the same is left open to be decided by this Court. The allegations of misconduct levelled against the worker in this case cannot be considered to be one which by its nature disentitles the worker to claim gratuity. Even if the allegation is true the same does not involve any question of moral turpitude or. cause any financial loss to the company. Any allegations of misconduct do not impose (sic) disentitle the workmen for gratuity. Hence in this particular case it is submitted that the worker is entitled for gratuity as claimed. The worker has put in 18 years of service and as such he is entitled to get at the rate of 15 days wages based on last draw wage rate for every completed years of service." In reply, which was filed by the management, the facts which have been set out above and the circumstances in which the dismissal was directed, were fully given. Before the Labour court, there seems to have been no dispute whatsoever that the dismissal of the respondent workman was on account of misconduct consisting, of behaving in a riotous and disorderly manner and having assaulted a tea maker (supervisor). The Labour court, however, referred to the judgment of this Court in *State of Punjab v. Suraj Parkash Kapur*, (1962) 2 SCR 711 = (A.I.R. 1963 SC 507) in which the general argument was not accepted that in all cases where services of an employee are terminated for misconduct, gratuity should not be paid to him. However, this Court has had occasion to consider in detail the various circumstances in which gratuity would be liable to forfeiture

for misconduct of a particular nature. It was laid down in Delhi Cloth & General Mills Co., Ltd., v. Workmen and Others, (1969) 2 SCR 307 = (A.I.R. 1970 SC 919) that the object of having a gratuity scheme is to provide a retiring benefit to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer, and it is, therefore, not correct to say that no misconduct however grave, may not be visited with forfeiture of gratuity. Misconduct could be of three kinds, (1) technical misconduct which leaves no trail of indiscipline, (2) misconduct resulting in damage to the employer's property which might be compensated by forfeiture of gratuity or part thereof, and (3) serious misconduct such as acts of violence against the management or other employees or riotous or disorderly behaviour in or near the place of employment, which, though not directly causing damage, is conducive to grave indiscipline. The first should involve no forfeiture, the second may involve forfeiture of the amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third will entail forfeiture of gratuity due to the workman. In other words, according to this decision, if a workman is guilty of a serious misconduct of the third category, then, his gratuity can be forfeited in its entirety."

In the present case, no such allegations are there of third category.

4.1. Apart from that the contention with regard to word "termination" raised by Mr. Thacker is misconceived inasmuch as because before terminating the service, full-fledged formal inquiry into allegations involving moral turpitude is required and admittedly, in the case of respondent, he was discharged from the service without any inquiry and without any stigma. Therefore, in my opinion, the contention raised by Mr. Thacker is misconceived and it is required to be rejected. Hence, the same is rejected and the order passed by both the authorities are just and proper and require no interference.

4.2. In view of the above discussion, it is clear that both the authorities have considered the evidence on record and when the employer has not thought it fit to take punitive action, then the authority or this court will not add any additional penalty in the facts of the case.

4.3. In the result, the petition is dismissed. Rule is discharged. The payment which is already deposited, shall be paid to the respondent.

[K.S. JHAVERI, J.]

/phalguni/